86-400

Supreme Court, U.S.
FILED
SEP 11 1986
JOSEPH F. SPANIOL, JR.
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No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

TRAILWAYS, INC., JOINT COUNCIL OF THE AMALGAMATED TRANSIT UNION, AFL-CIO, CLC,
Petitioner,

v.

TRAILWAYS LINES, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Whether an employer, who agrees in a collective bargaining agreement to grant his employees leaves of absence to hold union office with a right to return to work upon completion of their union service, and to permit those employees to retain their seniority and to accumulate seniority while on such leave, violates § 302 of the Labor Management Relations Act, 29 U.S.C. § 186, by also agreeing to contribute to a collectively bargained, jointly administered pension trust fund on behalf of those employees while on such leave.

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v.

TRAILWAYS LINES, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Trailways, Inc., Joint Council of the Amalgamated Transit Union, AFL-CIO, CLC, respectfully petitions this Court to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on April 22, 1986.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Pennsylvania, is unreported and is reprinted in the Appendix (hereinafter "App.") at 23a-29a. The Opinion of the United States Court of Appeals for the Third Circuit, reported at 785 F.2d 101, is reprinted at App. 1a-20a. The order denying rehearing and rehearing *en banc* is unreported, and is reprinted at App. 21a-22a.

JURISDICTION

The opinion of the United States Court of Appeals for the Third Circuit was entered on March 6, 1986. A timely petition for rehearing and rehearing *en banc* was denied on April 14, 1986. The judgment of the Third Circuit was issued on April 22, 1986 (App. 31a). On June 17, 1986, Justice Brennan signed an order extending the time for filing a petition for a writ of certiorari to and including September 11, 1986 (App. 30a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The pertinent provisions of the Labor Management Relations Act of 1947 are as follows:

Section 302(a), 29 U.S.C. § 186(a) provides, in pertinent part:

> It shall be unlawful for any employer . . . to pay, lend, or deliver, or agree to pay, lend, or deliver any money or other thing of value—
>
> (1) to any representative of any of his employees who are employed in an industry affecting commerce; or
>
> (2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce . . . .
>
> * * *

Section 302(c), 29 U.S.C. § 186(c) provides, in pertinent part:

> The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a

labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; . . . .

STATEMENT OF THE CASE

Trailways, Inc. ("Trailways") has a national collective bargaining agreement with the Trailways, Inc., Joint Council of the Amalgamated Transit Union, AFL-CIO, CLC ("Union") governing terms and conditions of employment for Trailways employees. The collective bargaining agreement permits Trailways employees to take leaves of absence from Trailways in order to accept full-time positions with the Union. The agreement provides that during such leave the employees will retain and accumulate their seniority with Trailways and guarantees the employees the right to return to active employment following the completion of their Union service. Specifically, the collective bargaining agreement states:

> SECTION 120. LEAVES OF ABSENCE—(a) Any employee, upon application in writing, may be granted a leave of absence, without pay.
>
> * * *
>
> (d) Employees returning from leave of absence shall return to the original assignment at time of leave, except in cases where vacancies, new positions, or changes have been made during the period of their absence, in which event such employee shall be allowed to exercise their seniority in displacing junior employees on such vacancies, new positions or changes.
>
> * * *
>
> (g) The Company agrees that an employee who accepts a position in the service of the Union, or the parent Union shall be granted a written leave of absence and shall retain and accumulate their seniority while in such service, provided that such employees desiring to be reinstated must apply to the

> Company within thirty (30) days from date of their retirement from such service.

Section 120 of the agreement further provides—and it is this provision that is the subject of this litigation—that Trailways will make pension trust fund contributions on behalf of employees during such leave for union service:

> (i) Employees accepting positions with the Union, or parent Union, shall be eligible for Group Insurance and Pension Plan, as provided other employees, and the Company shall make their required contribution on such employees behalf.

The pension trust fund is a trust established pursuant to § 302(c)(5) of the Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 186(c)(5); it is administered jointly by an equal number of Union and Trailways trustees (with a mechanism for a neutral trustee to break deadlocks) pursuant to a written document, and is designed to provide pensions for Trailways employees and their families.

Five Trailways employees were on leaves of absence to hold Union positions representing Trailways employees during the period of time relevant to this lawsuit.[1] Although the Union had other employees and officers who also represented Trailways employees, only these five were Trailways employees, and thus only these five had leaves of absence from Trailways coupled with protected seniority and a guaranteed right to resume working at Trailways when their Union service ended. Those rights were available to these Union officers only because they were, as employees on leave from Trailways, covered by the terms of the collective bargaining agreement. For the same reason, of all the officers and employees of the Union, Trailways made pension trust fund contributions only on behalf of these five.

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[1] Two were officers of the Joint Council, and the others were presidents of three of the constituent local unions.

From April 1983 until January 1984, Trailways made the required pension contributions to the pension trust fund on behalf of these five employee-officers, as Trailways had agreed to do in Section 120(i) of its collective bargaining agreement. In January 1984, Trailways unilaterally discontinued making those contributions. The Union demanded that Trailways make the contributions as required by the collective bargaining agreement, but Trailways refused.

On October 2, 1984, Trailways filed this action, seeking declaratory and injunctive relief against any attempted Union enforcement of Section 120(i) of the collective bargaining agreement on the ground that making the disputed pension trust fund contributions would violate § 302(a) of the LMRA, 29 U.S.C. § 186(a). By then, under the terms of the agreement, Trailways owed the pension trust fund approximately $5,000 for its employees on leave for Union service. On February 13, 1985, the district court granted Trailways' motion for summary judgment, holding that the contributions violated § 302(a).

The Union appealed, and on March 6, 1986, a divided court of appeals (Judge Garth wrote the opinion for the panel, joined by Judge Van Dusen; Judge Becker dissented), affirmed the district court. The panel majority rejected the Union's argument that the payments were permitted under § 302(c)(1), which exempts from § 302(a)'s coverage payments to an "employee or former employee . . . as compensation for, or by reason of, his service as an employee of such employer." The majority reasoned that the contributions were not made "as compensation for, or by reason of" their employment or former employment by Trailways (App. 9a):

> A logical reading of the statute makes clear that the "payments to former employees' exemption" of § 302(c)(1) applies solely to payments made as "compensation or by reason of" the former employ-

> ees past service to the employer. While the Union is correct in asserting that had these individuals never been Trailways' employees they would not be eligible for pension contributions made on their behalf, it does not therefore follow that the pension fund contributions made by Trailways pursuant to the collective bargaining agreement were made "in compensation for, or by reason of," their *former* service to Trailways so as to fall within the § 302 (c) (1) exception. Clearly, the statute contemplates payments to former employees for *past* services actually rendered by those former employees *while they were employees of the company.* Just as clearly, however, the pension fund benefits paid on behalf of former employees serving as union officials while on leave from Trailways are not compensation for their past service to Trailways.

On this point, Judge Becker dissented, reasoning as follow (App. 16a-17a):

> [T]he contributions in questions *are* compensation for services rendered to Trailways prior to the commencement of the leaves of absence.
>
> The collective bargaining agreement contains the terms of workers' employment with Trailways; each of the benefits the workers receive under that collective bargaining agreement are part of the consideration for their services at Trailways. In addition to the standard terms for wages, overtime pay, and insurance, the collective bargaining agreement provides that persons who take a leave of absence to work as union officials have a right to reinstatement at Trailways after their union service and retain their seniority during their absence. The collective bargaining agreement also provides that the employer will make payments into the union's pension fund while the employee is on leave. Although these contributions are made during the leaves of absence, the employer's promise to pay them is nonetheless a term of the collective bargaining agreement and therefore a part of the considera-

> tion for work performed as a Trailways employee. There is no reason for distinguishing the pension fund payments from any of the other terms of the collective bargaining agreement. Like wages, overtime, insurance, or accrued seniority, the pension fund payments are consideration for services rendered and, as such, are permissible under § 302(c)(1).

Judge Becker went on to state (App. 18a-19a):

> Contributions made as compensation for services rendered to Trailways simply do not constitute bribery of the Union or any other kind of support of the Union by Trailways. The majority's position that the contributions "are tantamount to direct compensation paid to [the Union's] employees or payments ot the Union" relies upon the premise that the contributions are made as compensation for service rendered to the Union, rather than service rendered to Trailways. For the reasons stated above, I disagree with this premise. For the same reasons, I believe that the contributions fall directly within the § 302(c)(1) exemption and that my position is therefore perfectly consistent with a strict construction of § 302.

Finally, Judge Becker recognized that practices of the type at issue here are widespread and long-standing, and concluded that the court should not upset such practices in the absence of clearer evidence that Congress intended to render them unlawful (App. 20a):

> Consideration of the widespread business practices of companies and unions provides further reason to believe that the pension contributions at issue here are not illegal and that the dangers the majority alleges are more ficticious than real. It was conceded at oral argument that similar arrangements are common in collective bargaining agreements and have never before been challenged on the grounds relied upon by the majority. While this fact is certainly not dispositive of the legality of such schemes,

it surely suggests that they are legal. This Court should be reluctant to overturn so widespread a practice, which represents a practical accommodation agreed upon by both businesses and unions.

The Union's petitions for rehearing and rehearing *en banc* were denied, with Judges Gibbons, Weis and Becker voting in favor of *en banc* reconsideration. (App. 21a-22a).

REASONS FOR GRANTING THE WRIT

As Judge Becker recognized, arrangements of the type in question here are indeed common in collective bargaining agreements in this country. The opinion of the court below, if not reversed, will cast into doubt provisions in hundreds of collective bargaining agreements covering thousands of workers—provisions that have been negotiated in good faith and that have been in those collective bargaining agreements for years, many pre-dating the passage of § 302. In fact, the existence of such arrangements was known to Congress, and accepted by Congress, when it enacted § 302. Yet, in light of the decision below, the validity of these long-standing collectively bargained arrangements will be uncertain—and there will be a resultant destabilization of established bargaining relationships—until this Court definitively resolves the matter.

The state of confusion in this area is heightened by a decision of the Second Circuit which is analytically in conflict with the decision below, and decisions of three other Circuits which point strongly in the opposite direction from the ruling below. The Court of Appeals for the Second Circuit in *BASF Wyandotte Corp. v. Local 227, International Chemical Workers Union, AFL-CIO*, 791 F.2d 1046 (2nd Cir. 1986), has ruled that an employer's agreement with the union representing the employer's employees to pay a union officer full pay for four hours each day during which the officer performs services for the union but none for the employer did not violate

§ 302, as the payment fell within the exemption of § 302(c)(1). As we discuss *infra* at 12-14, the reasoning of the Second Circuit in *BASF Wyandotte Corp.* cannot be reconciled with the decision of the Third Circuit in the instant case.

Similarly, the decision below is at odds with *Midstate Telephone Corp. v. NLRB*, 706 F.2d 401 (2nd Cir. 1983), and *Axelson, Inc. v. NLRB*, 599 F.2d 91 (5th Cir. 1979). In *Midstate Telephone* and *Axelson*, the Second and Fifth Circuits, respectively, held that provisions for employer payment of union representatives' bargaining expenses (per diem, travel and lodging) and wages for time lost while bargaining are mandatory subjects of bargaining. These decisions were cited with apparent approval by this Court in *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 107 n.17 (1983). The District of Columbia Circuit has reached the same conclusion in the context of federal sector labor law. *AFGE Council of Locals No. 214 v. FLRA*, No. 85-1500 (D.C. Cir.; August 26, 1986) (a proposal that a federal employer pay full pay to 12 employees who would perform no work for the employer but would engage in union representational activities is a mandatory subject of bargaining under federal sector labor law.)[2] Such provisions, which are analytically the same as the provision in this case, cannot be both mandatory bargaining subjects and illegal bargaining subjects.

Thus, the decision below is in tension with decisions of other Circuits. Given the widespread practical importance of the issue presented here, it is of some urgency that this Court promptly resolve the matter. This case is worthy of this Court's plenary consideration.

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[2] While § 302 of the LMRA does not apply to federal sector labor management relations, it is not probable that Congress would have required federal sector employers to bargain over matters that are illegal in the private sector.

Below we turn to a more detailed discussion of the points just raised.

1. The state of uncertainty introduced by the decision of the court below will have a substantial destabilizing impact on collective bargaining relationships and the bargaining process. Under the express holding below, pension contributions made on behalf of employees who take leave to serve their union would have to be terminated, eliminating or reducing those employees' pension coverage. Many unions have similar pension provisions in their major collective bargaining agreements and have had them for decades.[3] In addition, those unions and many others have collective bargaining agreements which contain provisions for other payments to, or on behalf of, union officer-

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[3] By way of example only, the United Automobile Workers Union pension plans include employees on union leave as employees entitled to pension coverage under nation-wide contracts in numerous industries, *see, e.g.*, Supplemental Agreement Covering Pension Plan, Exhibit A to AGREEMENT between GENERAL MOTORS CORPORATION and UAW dated September 21, 1984, 16-17, and have since the inception of the union's industry pension plans in 1949. The collective bargaining agreements between the Communication Workers of America and its locals and employers in the communication industry typically contain provisions allowing employees on approved leaves of absence to conduct union business to accrue service credits during such leaves up to certain fixed amounts. These credits are used for calculating pension benefits payable by the employer's pension plan when the employee retires. The International Brotherhood of Electrical Workers and its local unions have contracts with employers in a wide spectrum of industries—including utilities, communications, manufacturing and broadcasting—which provide for pension fund contributions on behalf of employees who are full-time union officers. In the utility sector alone, contracts covering more than 30 utility companies contain such provisions. Contracts of the International Union of Electronic, Electrical, Technical, Salaried & Machine Workers and the Oil, Chemical and Atomic Workers International Union contain similar provisions.

employees. Thus, for example, many unions have collective bargaining agreements containing "no docking" provisions, under which employees who are also union officials are paid by their employer for time absent from work conduting union business. *See infra*, at 12-13. In 1947, when § 302 was enacted, nearly half of the industrial collective bargaining agreements contained those provisions. *See* Basic Patterns in Collective Bargaining Contracts 15:127 (BNA, 1948). The practice has not diminished since 1947. Today, roughly 65% of major industrial collective bargaining agreements contain similar provisions. *See* Basic Patterns in Union Contracts 15 (BNA, 10th ed. 1983). *See also* Major Collective Bargaining Agreements: Employer Pay and Leave for Union Business (U.S. Department of Labor, Bureau of Labor Statistics, 1980) at 25-27. A myriad of other variations on this theme are presently in force in collective bargaining agreements throughout the country, and have been since before § 302 was enacted. *See* H. Rep. No. 245, 80th Cong., 1st Sess. 28-29 (1947).

As discussed *infra* at 15-16 n.6, courts that have considered such arrangements have found them to have a salutary, rather than an adverse, effect on the collective bargaining process. In the instant case, for example, if employer pension contributions and pension seniority credits must be cut off during a period when an employee undertakes union service, employees will be less inclined to serve in union positions because they will jeopardize the continuity of their pensions. There is no practicable way for an employee whose term of union service might be limited to obtain comparable pension benefits from some other source during that period.

Until now, none of the practices discussed above had been questioned in the nearly 40 years since the enactment of § 302. And there is nothing in the legislative history of § 302 to suggest that Congress intended to in-

validate these well-established practices.[4] The decision below casts doubt on the validity of these arrangements. Thus, the opinion of the court below is bound to unsettle otherwise well-settled collective bargaining relationships. Pressure will mount to eliminate these long-standing provisions and that pressure, whether or not successful, will at a minimum be a destabilizing force. This Court should dispositively resolve the issue now so that all parties in collective bargaining relationships will be certain about the governing rules.

2. The opinion below is in analytical conflict with the Second Circuit's opinion in *BASF Wyandotte Corp. v.*

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[4] The legislative history of § 302 is not supportive of the position taken by the majority below. That history shows that Congress' purpose in enacting § 302 was to end corruption in the administration of unions and union welfare funds, *see Arroyo v. United States*, 359 U.S. 419, 425-26 (1959), and had nothing whatsoever to do with the kind of practice at issue here. More particularly, the legislative history shows that Congress was well aware of various practices under which employers paid monies directly to union officers engaging in union work because that work disabled them from normal employment with the employer, and that Congress did not disapprove those payments when enacting § 302 and other contemporaneous amendments to the labor laws.

The Congress which enacted § 302 also amended, by other provisions in the same bill, the National Labor Relations Act to include, among other provisions, the present § 8(a)(2), 29 U.S.C. § 158(a)(2), prohibiting employer domination of or assistance to a union. In considering the bill that eventually became § 8(a)(2), Congress recognized that employers had regularly provided various forms of financial "assistance," including paying wages to union official-employees during time they spent on union business:

> Employers generally . . . allow representatives of the union, without losing pay, to confer not only with the employer but as well with employees, and to transact other union business in the plant.

H. Rep. No. 245, 80th Cong., 1st Sess. 28-29 (1947). In amending § 8(2) to its present form and in amending the enforcement section of the Act, § 10(c), 29 U.S.C. § 160(c), Congress made clear that such payments would continue to be lawful. *See* H. Rep. No. 510, 80th Cong., 1st Sess. 40-41 (1947).

Local 227, International Chemical Workers Union, AFL-CIO, supra. In that case, the employer, BASF, had agreed in its collective bargaining agreement to allow union officials employed by BASF to take four hours of leave each day to conduct union-related business (including meeting with management as well as preparing for union meetings and conducting other internal union business) and to pay those officials at their regular rate of pay for those hours, albeit during that time they performed no work for BASF. The court of appeals held that under the exception to § 302(a) contained in § 302(c)(1)—permitting payments to a union official "who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer"—the payment in question was permissible. Contrary to the analysis of the court below, the Second Circuit concluded that, by Congress' use of the alternative formulations of "for" and "by reason of," Congress intended to exempt not only direct wages for services ["for"] but also payments "occasioned by the fact that the employee *has performed or will perform* work for the employer, but which is not payment directly for that work ['by reason of']." *Id.* at 1049 (emphasis added). The four hours pay each day to a union official-employee for the period of time he performed no services for BASF was, in that court's view, "by reason of" the fact that the official "has performed [in the past] or will perform [in the future]" work for BASF.

The instant case—while involving a different type of benefit than that involved in *BASF Wyandotte Corp.*—poses the same question of construction of § 302(c)(1), and the court below gave a construction in conflict with that of the Second Circuit. The union officers who benefited from the pension fund contributions here were all Trailways employees who "ha[d] performed" work for Trailways under a collective bargaining agreement which entitled them to take union leave. And, under that col-

lective bargaining agreement, those employee-officers retained the right to return to work at Trailways and therefore, assuming they choose to exercise this right, "will perform" work for Trailways. Under the Second Circuit's analysis, the pension contributions the court below found to violate § 302 would be lawful.[5]

It is of course always troublesome when the governing law differs from one circuit to another. The problem is heightened here because many collective bargaining agreements are national in scope, covering workplaces in both the Second and Third Circuits. And, of course, as already discussed, the conflicting analyses of these two circuits will confound as well bargainers attempting to reach solutions applicable in any of the other circuits. Parties to collective bargaining are in need of a definitive interpretation of § 302(c)(1) by this Court.

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[5] The Second Circuit's repeated statements that the employee receiving pay for lost time must be a "bona fide employee of the payor," *id.* at 1049, 1050, does not render that case distinguishable from this one. The court below did not base its decision on the conclusion that the employee-officers were not bona fide employees, but rather that they were not "active" employees. It is clear from the Second Circuit's opinion that the Third Circuit's "active-inactive" distinction is not the same as the Second Circuit's "bona fide employee" analysis, since the Second Circuit's operative definition of a bona fide employee was that the employee "ha[d] performed *or* will perform" work for the employer. Or, put another way, the court said:

> "we do not suggest that section [§ 302(c)(1)] would allow an employer simply to put a union official on its payroll while assigning him no work." *Id.* at 1050.

Here, each union officer-employee had worked for Trailways and had a right to return to work for Trailways after his union service. In that regard, this case is indistinguishable from *BASF Wyandotte Corp.* but is wholly different from *Reinforcing Iron Workers Local Union 426 v. Bechtel Corp.*, 634 F.2d 258 (6th Cir. 1981) and *Todd v. Benal Concrete Construction Co.*, 710 F.2d 581 (9th Cir. 1983), *cert. denied*, 465 U.S. 1022 (1984), relied on by the court below, in which the "employee" in question had never performed work for the employer.

3. The opinion below is in tension with yet another line of cases. In *Midstate Telephone Corp. v. NLRB*, *supra*, the Second Circuit enforced a National Labor Relations Board order holding that an employer's unilateral discontinuation of payment to its employees of per diem, travel and lodging expenses incurred by the employees solely in connection with their role as union negotiators during contract negotiations was a violation of § 8(a)(5) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(a)(5). In *Axelson, Inc. v. NLRB*, *supra*, the Fifth Circuit enforced a National Labor Relations Board order holding that an employer's unilateral discontinuation of payment of wages to its employees during time spent by those employees as union negotiators was in violation of § 8(a)(5) of the NLRA. The predicate for both decisions was that payments of this kind are mandatory subjects of bargaining under the NLRA and, as mandatory subjects, the employers were not free unilaterally to discontinue the payments.[6] This Court

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[6] In the course of the opinions in *Midstate Telephone* and *Axelson*, both courts recognized that the payments in question "encourag[ed] the collective bargaining process." The court in *Midstate Telephone* stated:

> In this case, the Board determined, and we agree, that reimbursement of per diem, travel, and lodging expenses similarly involves a mandatory subject of bargaining because it "inure[s] to the benefit of all of the members of the bargaining unit by contributing to more effective collective-bargaining representation and thus 'vitally affect[s]' the relations between an employer and employee." [*Midstate Telephone Corp.* v. *NLRB*, *supra*, 706 F.2d at 405]

Likewise, the court in *Axelson* stated:

> [T]he qualifying subjects [employer-paid benefits to unions or union officer-employees] benefit all of the members of the bargaining unit through encouraging the collective bargaining process and vitally affecting the relationship between the employer and employees.
>
> The Board, in its decision, emphasized the similarity of the benefits inuring to the Union members in the instant case with

cited both of these decisions with apparent approval in *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, *supra*, 464 U.S. at 107, n.17.[7]

The District of Columbia Circuit in *AFGE Council of Locals No. 214 v. FLRA*, No. 85-1500, *supra*, reached the same conclusion as the courts in *Midstate Telephone* and *Axelson* in a case arising in the federal sector under the Federal Labor-Management Relations Act, 5 U.S.C. §§ 7101 *et seq.* In that case, the court held that a union proposal that a federal employer pay full salary to 12 employees who would perform no work for the employer but would serve as full-time union representatives is a mandatory subject of bargaining.

Under the analysis of the court below, the payments in question in *Midstate Telephone* and *Axelson*—and, were § 302 applicable to the federal sector,[8] the payments in question in *AFGE*—would be found illegal. Suffice it to

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those involved in the presentation of grievances. It advances the theory that effectiveness of the collective bargaining process will be greatly diminished by permitting companies through unilateral action to discourage seasoned and well qualified union representatives from participating in collective bargaining. The Board argues that many highly skilled union negotiators will be reluctant to continue to serve on the committee if they are required to negotiate only during off-time or lose their production pay. These arguments do not fall on deaf ears. We are not unaware of the reluctance a person might have to make such sacrifices. [*Axelson, Inc. v. NLRB*, *supra*, 599 F.2d at 94-5, footnote omitted.]

[7] This Court said:

[U]nions may presumably negotiate for such payments in collective bargaining as they do in the private sector. *See Midstate Tel. Corp. v. NLRB*, 706 F.2d 401, 405 (CA2 1983); *Axelson, Inc. v. NLRB*, 599 F.2d 91, 93-95 (CA5 1979).

[8] While § 302 does not apply to federal sector labor relations, it is unlikely that Congress, when it enacted the federal sector labor laws, would have permitted bargaining over a provision which, in private sector bargaining, it had declared illegal.

say that an illegal benefit cannot be a mandatory subject of bargaining. *Midstate Telephone*, *Axelson*, and *AFGE Council of Locals No. 214* are thus at war with the decision below. Sensible and stable labor negotiations become more difficult in a context where governing decisions point in opposite directions on a matter of some significance in the negotiations. For this reason, as well as for the reasons stated earlier, the issue presented here requires resolution by this Court.

CONCLUSION

For the reasons set forth above, this Court should grant a writ of certiorari to review the decision and judgment of the Third Circuit in this case.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-1156

TRAILWAYS LINES, INC.,
Appellee

v.

TRAILWAYS, INC. JOINT COUNCIL OF THE AMALGAMATED TRANSIT UNION, AFL-CIO, CLC,
Appellant

On Appeal from the District Court
of the Eastern District of Pennsylvania
D.C. Civ. No. 84-4703

Argued October 21, 1985

BEFORE: GARTH, BECKER, and VAN DUSEN,
Circuit Judges

(Opinion filed March 6, 1986)

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OPINION OF THE COURT

GARTH, *Circuit Judge*:

I.

Plaintiff-appellee, Trailways Lines, Inc. ("Trailways") brought this action against defendant-appellant Trailways, Inc., Joint Council of the Amalgamated Transit Union, AFL-CIO, CLC ("Union"), seeking a declaratory judgment that section 120(i) of the parties' collective bargaining agreement was in violation of the Labor Management Relations Act. Section 120(i) required Trailways to make contributions to a joint union-management pension trust fund on behalf of employees who take leaves of absence to accept full-time positions with the Union or its parent International. Trailways contends that provision violates § 302(a) of the Labor Management Relations Act, 29 U.S.C. § 186(a), and relieves Trailways of the obligation imposed by the collective bargaining agreement.

The Union filed a counterclaim seeking declaratory and injunctive relief requiring Trailways to make pension fund contributions pursuant to section 120(i) of the agreement and directing Trailways to pay all past due contributions plus interest. Both parties filed cross motions for summary judgment and, on February 13, 1985, the district court granted Trailways' motion and denied the Union's motion. For the reasons set forth below, we affirm.

II.

In 1983, Trailways and the Union entered into a nationwide collective bargaining agreement. Pursuant to that agreement, Trailways employees were permitted to take leaves of absence to accept full-time positions with the Union while at the same time accumulating seniority and retaining the right to return to active employment with Trailways following Union service. That agree-

ment further required Trailways to make insurance and pension trust fund contributions on behalf of those employees during their leaves of absence to enter full-time Union service.[1] The Pension Trust Fund, administered jointly by Union and Trailways trustees, was designed to provide pensions for Trailways' employees and their families.

Five Trailways' employees took indefinite leaves of absence to hold full-time union positions during the period relevant to this action. Accordingly, their seniority and return rights and pension trust fund payments were governed by section 120 of the Collective Bargaining Agreement. From April 1983 until January 1984, Trailways made the required pension trust fund payments on behalf

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[1] Specifically, the pertinent parts of the collective bargaining agreement provided:

> SECTION 120. LEAVES OF ABSENCE—(a) Any employee, upon application in writing, may be granted a leave of absence, without pay.
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> * * * *
>
> (a) The Company agrees that an employee who accepts a position in the service of the Union, or the parent Union shall be granted a written leave of absence and shall retain and accumulate their seniority while in such service, provided that such employees desiring to be reinstated must apply to the Company within thirty (30) days from the date of their retirement from such service.
>
> * * * *
>
> (d) Employees returning from leave of absence shall return to the original assignment at time of leave, except in cases where vacancies, new positions, or changes have been made during the period of their absence, in which even such employees shall be allowed to exercise their seniority in displacing junior employees on such vacancies, new positions or changes.
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> * * * *
>
> (i) *Employees accepting positions with the Union, or parent Union, shall be eligible for Group Insurance and Pension Plan, as provided other employees, and the Company shall make their required contribution on such employees' behalf.* (emphasis added)

of these five employees. However, in January 1984, Trailways unilaterally stopped making such payments, and, as of the date of the filing of this action, owed the following sums to the Trust Fund pursuant to the Agreement:

Frank DeWolfe	$1,002.00
Burl B. Scarborough	1,076.00
George R. Olson	968.00
R. B. Patterson	818.00
Edward W. Erkel	1,188.00

III.

Section 302(a) of the Labor Management Relations Act, 29 U.S.C. § 186(a) provides in pertinent part:

> It shall be unlawful for any employer . . . to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—
>
> (1) to any representative of any of his employees who are employed in any industry affecting commerce; or
>
> (2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce . . .

There is no dispute that Trailways' payments to the Pension Trust Fund would be prohibited by § 302(a) unless they fall within one of the express statutory exemptions provided by § 302(c), which is set out below. Payments to trustees administering a pension trust are payments to an "employee representative," and payments on behalf of the five union officials constitute "a thing of value" made to union officers.

The Union argues, however, that such payments are permitted by the exceptions established by §§ 302(c)(1)

and 302(c)(5).[2] Section 302(c)(1) exempts the payment of:

> money or other thing of value by an employer to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer.

Section 302(c)(5) exempts the payment of:

> money . . . to a [pension] trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer . . .

The district court held that the issue of whether Trailways' payments to the Pension Fund were excepted by § 302(c)(5) (and, presumably by § 302(c)(1), as well) depends solely on "whether these union officials retain their status as Trailways' employees while on their leaves." *Trailways Lines, Inc. v. Trailways, Inc. Joint Council of the Amalgamated Transit Union, AFL-CIO*, No. 84-4703, slip op. at 3 (E.D. Pa. Feb. 13, 1985). The district court concluded that the five union officials on indefinite leave were solely employees of the Union and thus fell without the § 302(c) exceptions. The Union, on

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[2] The Union did not raise § 302(c)(1) as an exception to § 302(a) before the district court. Ordinarily an appeals court will not consider issues not raised in the court below. Rhoads v. Ford Motor Co., 514 F.2d 931, 933-34 (3d Cir. 1975); Cady v. Twin Rivers Towing Co., 486 F.2d 1335, 1337 (3d Cir. 1973); Bogacki v. American Machine & Foundry Co., 417 F.2d 400, 407 (3d Cir. 1969); O'Neill v. United States, 411 F.2d 139, 143 (3d Cir. 1969). This rule, however, is subject to exception when the interests of fundamental justice will be served. *O'Neill*, 411 F.2d at 143-44; Hormel v. Helvering, 312 U.S. 552 (1941). Where, as here, we are faced purely with a related question of law involving statutory construction not requiring any additional fact finding by the district court, and where the failure to consider this issue will only result in needless uncertainty bound to result in future litigation, we will review the Union's § 302(c)(1) argument in the interests of justice. *See* 28 U.S.C. § 2106.

the other hand, argues that the district court's analysis was faulty for three reasons: (1) the five union officials retained their status as Trailways' employees or former employees while on leave; (2) even if the employees were not Trailways' employees while on leave, the issue of whether the § 302(c)(1) or (c)(5) exemptions applies does not depend on whether the union officials are or are not *present* employees of Trailways; and, (3) the legislative history and policy behind § 302 support the Union's contention that such payments were not intended to be proscribed by § 302.

For the reasons discussed below, we hold that the payments required by the collective bargaining agreement do not fall within any of the § 302(c) exceptions, and thus are prohibited by § 302(a) of the LMRA.

A.

Dealing first with the Union's second argument, the plain language of the Act, as construed by the courts, supports the district court's finding that the status of the five individuals while on leave as either employees of Trailways or the Union is dispositive of this case. The cases clearly hold that the Act permits payments to trust funds by employers only if they are made on behalf of *present* employees of the employer. As then Judge Blackmun stated in *Blassie v. Kroger Co.*, 345 F.2d 58, 68-69 (8th Cir. 1965):

> The section [302(c)(5)] also requires that there be payment [to a trust fund] affected during an employee's *active* employment. . . . An employee ordinarily is a person presently engaged in employment. He is "One employed by another; one who works for wages or salary in the service of an employer . . . ."
>
> However, the presence of these two requirements—payment by the employer and *current* employment—does not mean that benefits which flow from these

> contributions of the employer (and from any other receipts of the Trust) are to be confined in their employment to the period of the employee's active employment. (Emphasis added) (Citations omitted)

From the above, it is plain that employer's payments to a pension trust fund must be on behalf of "current" and "active" employees of the employer.[3]

The Union argues that payments on behalf of individuals "who are *at some time* employees of the employer" are permissible under the § 302(c) exceptions. Decisional law does not support this contention. In *Walsh v. Schlect*, 429 U.S. 401 (1977), in holding that payments by an employer on behalf, or for the benefit, of employees of a subcontractor who was not a signatory to the collective bargaining agreement would violate § 302 (a)(1), the Supreme Court stated that only payments made solely for the benefit of *actual* employees of the signatory employers are permissible under § 302 (c)(5). 429 U.S. at 407, 409.[4]

Similarly, the Sixth Circuit in *Reinforcing Iron Workers Local Union 426 v. Bechtel Power Corp.*, 634 F.2d 258, 261 (6th Cir. 1981), held that payments made by an employer to a fund established by a collective bargaining agreement to compensate a full-time steward hired by the union to investigate the employer's compliance with that agreement violated § 302(a) since the "steward cannot be characterized as an employee of Bechtel."

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[3] As *Blassie* also makes clear, the *benefits* payable from such a trust fund may be made to individuals, including union officials, who are *not* current employees of the employer. *Id.* at 68, 73. This is self-evident, since by definition pension benefits will be paid to retired former employees no longer employed by the employer.

[4] The Court did hold that payments "measured" by the hours worked by the subcontractor's employees but whose benefits are payable only to the actual employees of the general contractor are permissible. 429 U.S. at 407.

The Union contends that *Reinforcing Iron Workers* and *Walsh* are distinguishable from the case at bar since in those cases the individuals for whom the disputed payments were made were *never* employees of the employer, whereas here the individuals on leave are *former* and *possible future* employees of Trailways. This distinction, however, is not relevant. In both *Reinforcing Iron Workers* and *Walsh*, it is clear that the determinative factor was that the employees involved—the union steward in *Iron Workers* and the subcontractor's employees in *Walsh*—were not, nor could they be considered—*current* employees of the employer. Neither court stated that had the disputed individuals been either *former* or *future* employees of the employer the outcome would have been different. Neither case dispels the *Blassie* requirement of current employment to qualify for the § 302(c)(5) exemption. *See also Todd v. Benal Concrete Construction Co.*, 710 F.2d 581 (9th Cir. 1983) (§ 302(c)(5) permitted contributions only on behalf of a contractor's *own* employees, not for the benefit of employees of independent contractor).

B.

The Union also argues that § 302(c)(1) does not require that individuals for whom pension fund payments are made be current employees of the employer. According to that section, payments to "former" employees are permissible so long as they are in "compensation for, or by reason of, his service as an employee of such employer." To the Union, the pension fund contributions made on behalf of former employees currently on leave to serve as union officials were earned solely "by reason" of their past service to Trailways. But for their past employment by Trailways, the Union contends, these officials would not be eligible for pension fund contributions; therefore, these payments are "by reason of their service as an employee of" Trailways.

A logical reading of the statute makes clear that the "payments to former employees' exemption" of § 302(c)(1) applies solely to payments made as "compensation or by reason of" the former employees *past* service to the employer. While the Union is correct in asserting that had these individuals never been Trailways' employees they would not be eligible for pension contributions made on their behalf, it does not therefore follow that the pension fund contributions made by Trailways pursuant to the collective bargaining agreement were made "in compensation for, or by reason of," their *former* service to Trailways so as to fall within the § 302(c)(1) execption. Clearly, the statute contemplates payments to former employees for *past* services actually rendered by those former employees *while they were employees of the company.* Just as clearly, however, the pension fund benefits paid on behalf of former employees serving as union officials while on leave from Trailways are not compensation for their past service to Trailways.[5]

Thus, the sole issue remaining is whether the § 302(c)(5) exemption, either by its express terms or by implication, renders § 302(a) inapplicable to these payments. This in turn depends on the status of the five union officials while on leave of absence.

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[5] Pursuant to the collective bargaining agreement, the pension fund contributions made on behalf of former employees serving as full-time union officials are measured by their salaries received in their *current union positions,* thereby indicating that the pension fund contributions made on their behalf are geared to their *contemporaneous* services to the Union.

Since it is undisputed that the individuals involved perform *no present* services for Trailways for which they could be compensated while on leave to serve the Union, the § 302(c)(1) "payment to present employees" exemption likewise does not apply here. It is therefore evident that the contributions to the pension fund are not in compensation for, or by reason of, the employees' current service to Trailways. Thus § 302(c)(1) does not in any way exempt these payments from the § 302(a)(1) prohibition.

C.

By its terms, § 302(c)(5) exempts payments made to a pension trust fund "for the sole and exclusive benefit of the employees of such employer" from the § 302(a)(1) prohibition. The statute clearly states that such pension fund payments by an employer are permitted so long as they are made for the benefit of "employees of such employer." The district court correctly concluded, and it is undisputed on appeal, that the five employees here while on leave were "employees of the defendant union and representatives of the employees" of Trailways. *Trailways*, No. 84-4703, slip op. at 6. However, the precise issue before us is whether these persons, while undeniably union employees, may also be at the same time employees of Trailways for purposes of § 302(c)(5).[6]

The Union, pointing to arbitration decisions interpreting various collective bargaining agreements, argues that the question of the status of an individual as employee is purely a matter of contract. These decisions, the Union argues, make clear that an individual remains an employee of an employer so long as he "retains seniority and return rights" while absent from the employ of the employer, even if such individual is employed by another. Thus, the Union argues, an individual may properly be considered the employee of *both* the Union and Trailways while on leave of absence, thereby rendering payments made on behalf of these individuals permissible under § 302(c)(5) of the Act.

However, the issue of the status of employees is not solely a question of contract. Rather, it is a question of law turning also on the degree of control exercised by the employer over the employee, and on a determination

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[6] The district court concluded that these individuals "qualify as the representatives of the employees of the plaintiff *and are not themselves the employees of the plaintiff.*" *Trailways*, No. 84-4703, slip op. at 6. (Emphasis added).

of for whose benefit the employee is performing his services. See *Todd v. Benal Concrete Construction, Co.*, 710 F.2d 581, 584 (9th Cir. 1983) ("[c]ontractual language alone cannot transform a contractor/independent contractor relationship into an employer/employee relationship.")[7] Under either of these tests, the individuals here cannot be considered Trailways' employees while on leave, since they are in no way controlled by Trailways, nor do they perform any services for the benefit of Trailways.

The Union points to no case supporting its position that a *full-time* union official on leave retains his status as an employee of his employer.[8] The fact that courts have held that direct payments made to company employees for time spent conducting union business during working hours pursuant to "no-docking" provisions contained in collective bargaining agreements do not violate § 302(a)(1), does not mean that payments made on behalf of *full time* union officials who perform no work for the employer do not violate the Act. *See, e.g., BASF Wyandotte Corp. v. Local 227, International Chemical Workers Union*, 591 F. Supp. 339 (N.D.N.Y. 1984); *Employees' Independent Union v. Wyman Gordon Co.*, 314 F. Supp. 458 (N.D. Ill. 1970). There is a sound distinction between payments made to a union official who goes on *temporary* leave to conduct union business and then returns to *active* employment, and payments on behalf of union officials who are on *full-time* leave but who may *never* return to full-time employment of his employer. Thus, there is no basis in the case law for con-

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[7] The definition of "employees" put forth in *Blassie* fully supports this position. There, in holding that § 302 prohibited payments to pension funds on behalf of employees who had already retired, the court defined an employee as "[o]rdinarily . . . a person presently engaged in employment . . ." or "one who works for wages or salary in the service of another". 345 F.2d at 68-69.

[8] Arbitration decisions as to questions of law have no binding precedential value on this Court.

cluding that an individual may be considered an employee of both the Union and the employer for § 302(c)(5) purposes.[9]

This view furthers the public policy goals intended by Congress to be served by § 302. Section 302 was designed to prohibit payments from employers to unions and union officials to prevent bribery of employee representatives, extortion by employee representatives, and abuse of welfare funds by union officials when such funds were left solely to union control. *See Arroyo v. United States*, 359 U.S. 419, 425-26 (1959).[10] As the Supreme Court stated

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[9] *New York State Teamsters Conference Pension and Retirement Fund v. Hoh*, 554 F. Supp. 519 (N.D.N.Y. 1982) does not support the Union's position. It is true that the court there noted that:

> plaintiff's contention that defendant Hoh and other named individual defendants were not "employees" of a brewery since they were full time union officials, and therefore not entitled to pension credits or benefits, is wholly without merit. First, elected union officials were considered brewery employees on a leave of absence, *see* n.3 & 4 *supra*, (Hoh and the individual defendants fit into this category); *see Moglia v. Geoghegan*, *supra*, 403 F.2d at 116 (only employees and former employees may qualify as beneficiaries of a trust. Since the individual defendants here were at least former employees, it is irrelevant whether they were then current brewery employees); *see also United States Trucking Corp. v. Strong*, 359 F.2d 392 (2d Cir. 1966); second, as *Blassie* points out, it is not unlawful under § 302 for the Trust to pay benefits to employees of the trust and union officials, especially when there is a writing setting forth the basis for such payments, *see* n.4 *supra*.

554 F. Supp. at 528 n.15.

However, in *Hoh* the court clearly based its ruling that § 302 was not violated on the fact that the pension fund payments made on behalf of the union officials on leave from the company were in fact made by the *union*, not the employer. Accordingly, the above language which seemingly argues for the union's position, is merely dicta.

[10] Senator Ball, the sponsor of § 302 in the Senate, stated that

> the sole purpose of the amendment is . . . to make sure that [welfare funds] are legitimate trust funds, used actually for

in *Arroyo*, "To remove these dangers, specific standards were established to assure that welfare funds would be established only for purposes which Congress considered proper and expended only for the purposes for which they were established." *Id.* at 426.

Pension fund contributions made on behalf of Union officials on leave from Trailways are tantamount to direct compensation paid to its employees or payments made to the union. (*See Knauss v. Gorman*, 583 F.2d 82, 89 (3d Cir. 1978) (contributions to a welfare fund constitute payments in lieu of wages to the fund's beneficiaries). While payments made on behalf of Union officials who were once active employees of the employer but who may never return to his employ may not at first blush be the kinds of payments thought to lead to corruption of union officials, the potential for such corruption, or at least the appearance of it, nevertheless remains. The inherently adversarial relationship between employers and unions argues strongly against considering such individuals as being both employees of Trailways while at the same time they are serving as full-time union officials. *See General Building Contractors Association v. Pennsylvania*, 458 U.S. 375, 393-394 (1982).

Accordingly, we hold that since the former Trailways' employees who have taken leaves of absence to pursue full-time Union service may not be considered employees of Trailways while on such leave for purposes of § 302 (c) (5), payments made on behalf of those employees to a pension trust fund violate § 302(a) (1) of the Labor Management Relations Act.[11]

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the specific benefits to the employees of the employers who contribute to them, and that they shall not degenerate into bribes. [II Legis. Hist. at 1305].

[11] Trailways also contends that the payment of pension contributions at issue here violates sections 8(a) (1) and (3) and section 8(b)1(A) and (2) of the LMRA, 29 U.S.C. §§ 158(a) (1) and (3); 29 U.S.C. §§ 158(b) (1) (A) and (2). According to Trailways, sec-

IV.

The February 13, 1985 order of the district court which: (1) declared section 120(i) of the parties' collective bargaining agreement unenforceable; (2) stayed the Union from taking action to require Trailways to make contributions; and, (3) which granted Trailways' motion for summary judgment, will be affirmed.

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tion 120(i) constitutes a preferential contractual provision which illegally discriminates in favor of the Union in violation of section 8(a)(3). The Union argues that these claims are in fact alleged unfair labor practices over which the National Labor Relations Board has exclusive jurisdiction.

Because we have disposed of this case on the § 302(c) issue, as did the district court, we need not reach or decide the merits of these contentions.

BECKER, *Circuit Judge*, dissenting.

I agree with the majority that employees on leave of absence are not present employees of Trailways and that the challenged contributions are therefore not permissible under § 302(c)(5). However, I disagree with the majority with respect to § 302(c)(1); I believe that that section exempts the contributions at issue from the prohibition of § 302(a) because they were made "as compensation for, or by reason of" the absent employees' services to Trailways while they were active employees. Accordingly, I respectfully dissent.

Section 302(a) of the Labor Management Relations Act, 29 U.S.C. § 186(a) provides in pertinent part:

> It shall be unlawful for any employer . . . to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—
>
> (1) to any representative of any of his employees who are employed in any industry affecting commerce; . . .

As the majority correctly states, there is no dispute that Trailways' payments to the Pension Trust Fund are prohibited by § 302(a) unless they fall within one of the express statutory exemptions provided by § 302(c).[1] Section 302(c)(1) exempts the payment of:

> money or other thing of value payable by an employer to any officer or employee . . . of a labor organization, who is also an employee *or former employee* of such employer, as compensation for,

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[1] There is also no dispute that a contribution to a pension fund from which the persons on leave will eventually draw retirement benefits is a "thing of value" given to these persons by Trailways. *See* Knauss v. Gorman, 583 F.2d 82, 89 (3d Cir. 1978) (contributions to a welfare fund constitute payments in lieu of wages to the fund's beneficiaries).

> or by reason of, his service as an employee of such employer. (Emphasis added)

Unlike § 302(c)(5), which refers to current employees only, § 302(c)(1) covers former employees of Trailways and thus applies to the plaintiffs in this case.[2] The central question, therefore, is whether the trust fund contributions are made "as compensation for, or by reason of," services rendered by the persons now on leave when they were employees of Trailways.[3]

The majority summarily rejects the argument that § 302(c)(1) is applicable:

> Clearly, the statute contemplates payments to former employees for *past* services actually rendered by those former employees *while they were employees of the company.* Just as clearly, however, the pension fund benefits paid on behalf of former employees serving as union officials while on leave from Trailways are not compensation for their past service to Trailways. (Emphasis in original)

Maj. Op. at 11-12. I take issue with the majority because I believe that the contributions in question *are* compensation for services rendered to Trailways prior to the commencement of the leaves of absence.

The collective bargaining agreement contains the terms of workers' employment with Trailways; each of the benefits the workers receive under that collective

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[2] Section 302(c)(1) refers only generally to a "thing of value," while § 302(c)(5) specifically addresses payments to trust funds. However, there is nothing in the language of the statute to indicate that § 302(c)(5) is preemptive, that is, that payments to trust funds can be exempt only under § 302(c)(5).

[3] I agree with the majority's conclusion that, although the Union did not raise the § 302(c)(1) argument in the district court, in the interests of justice we should review this argument because the statutory arguments are integrally related and because failure to consider the issue will result in unnecessary future litigation.

bargaining agreement are part of the consideration for their services at Trailways. In addition to the standard terms for wages, overtime pay, and insurance, the collective bargaining agreement provides that persons who take a leave of absence to work as union officials have a right to reinstatement at Trailways after their union service and retain their seniority during their absence. The collective bargaining agreement also provides that the employer will make payments into the union's pension fund while the employee is on leave. Although these contributions are made during the leaves of absence, the employer's promise to pay them is nonetheless a term of the collective bargaining agreement and therefore a part of the consideration for work performed as a Trailways employee. There is no reason for distinguishing the pension fund payments from any of the other terms of the collective bargaining agreement. Like wages, overtime, insurance, or accrued seniority, the pension fund payments are consideration for services rendered and, as such, are permissible under § 302(c)(1).

The majority ignores this point. Noting that the contributions are measured by the former employees' union salaries, the majority concludes that the pension fund contributions are "geared to their contemporaneous services for the Union." Maj. Op. at 12 n. 5. While the majority's observation is correct, it does not support the majority's conclusion. Contributions that are *geared* to contemporaneous union services are not necessarily paid *as compensation for* that union service. Obviously, Trailways needs a standard by which to measure seniority advances and pension contributions during employees' leaves of absence. The most reasonable standard is that provided by the terms of the absentees' employment by the Union. Just as seniority advances during leaves of absence are measured by the amount of time that the persons spend on leave, pension contributions are measured by the amount of money that these persons earn during their leave.

This conclusion is supported by analogy to the decision in *Walsh v. Schlecht*, 429 U.S. 401 (1977), in which the Supreme Court upheld the legality under § 302(a)(1) of contributions *measured by* the hours worked by a subcontractor's employees that were nevertheless made *on behalf of* the contributor contractors own employees. In *Walsh*, the use of other employees' salaries as a yardstick for determining amount of contributions was permissible under § 302(c)(5). Similarly, the use of salaries earned *in another capacity*—as Union employees—as a standard of measurement for contributions made as compensation for work at Trailways should be permissible under § 302(c)(1).

To bolster its conclusion that the challenged contributions are impermissible, the majority argues that the policies underlying § 302—the prevention of the use of funds administered by unions as "war chests," and of bribery of union officials by employers, *see Arroyo v. United States*, 359 U.S. 419, 425-26 (1959)—would be threatened by a decision upholding the contributions here. The majority also relies for its decision on the fact that courts have established a rule of strict compliance with the provisions of § 302. *See e.g., Arroyo*, 359 U.S. at 424; *Costella v. Lipsitz*, 547 F.2d 1267, 1273 (5th Cir. 1977); *Bricklayers, Masons and Plasterers International Union of America, Local Union No. 15 v. Stuart Plastering Co.*, 512 F.2d 1017, 1024 (5th Cir. 1975). However, upholding the contributions in this case neither offends the policy of the act nor entails a waiver of strict compliance with the language of § 302.

Contributions made as compensation for services rendered to Trailways simply do not constitute bribery of the Union or any other kind of support of the Union by Trailways. The majority's position that the contributions "are tantamount to direct compensation paid to [the Union's] employees or payments to the Union" relies upon the premise that the contributions are made as com-

pensation for service rendered to the Union, rather than service rendered to Trailways. For the reasons stated above, I disagree with this premise. For the same reasons, I believe that the contributions fall directly within the § 302(c)(1) exemption and that my position is therefore perfectly consistent with a strict construction of § 302.

The cases upholding the legality of "no-docking" provisions under § 302(c)(1) strongly support the conclusion that the payment of pension contributions in this case is legal. Under a "no-docking" provision, union officers are entitled to take time off from work, without loss of pay, to conduct union business. In upholding a "no-docking" provision under which the union officials were entitled to take four hours off from work on a given day, the court in *BSAF Wyandotte Corp. v. Local 227, International Chemical Workers' Union*, 591 F.Supp. 339 (N.D.N.Y. 1984), stated that such an agreement "is a cooperative effort representing the product of arms-length bargaining and does not present the type of opportunity for employer interference in union affairs which § 302 is designed to prevent." *Id.* at 342.[4] The same is true here, for the provisions of the collective bargaining agreement in this case, like the no-docking clause in *BSAF Wyandotte*, are simply bargained-for terms of the employees' employment with their companies.

Trailways and the majority attempt to distinguish the "no-docking" cases on the ground that the union officials were active employees who used only part of their day for union business. The distinction does not work, however. During the hours that these persons spent on union activities, they were not rendering services to their em-

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[4] *See also* Employees' Independent Union v. Wyman Gordon Co., 314 F. Supp. 458 (N.D. Ill. 1970); United States v. Motzell, 199 F. Supp. 192 (D.N.J. 1961). *Cf.* Bur. of Al., Tob. and Fire. v. Fed. Lab. Rel. Auth., —— U.S. ——, 104 S. Ct. 439, 449 n. 17 (1983) (stating in dictum that unions may negotiate for payment by employers of expenses and travel allowances for union negotiators).

ployer, and they were not under their employer's control. The distinction between using part of the day for union business and taking leaves of absence to become full-time union officials is only one of degree: the nature of the absences and the payments made by the employer during them (or measured by them) is the same.[5]

Consideration of the widespread business practices of companies and unions provides further reason to believe that the pension contributions at issue here are not illegal and that the dangers the majority alleges are more ficticious than real. It was conceded at oral argument that similar arrangements are common in collective bargaining agreements and have never before been challenged on the grounds relied upon by the majority. While this fact is certainly not dispositive of the legality of such schemes, it surely suggests that they are legal. This Court should be reluctant to overturn so widespread a practice, which represents a practical accommodation agreed upon by both businesses and unions.

It is also relevant that Trailways at no point suggested that it was coerced into making the contributions. It entered the agreement it now challenges with its eyes wide open. The collective bargaining agreement is thus undeniably the product of arms-length negotiation. We should endeavor to uphold such agreements, not to substitute for them others that we might prefer.

For the foregoing reasons, I would reverse the judgment of the district court.

A True Copy:
Teste:

Clerk of the United States Court of Appeals for the Third Circuit

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[5] If anything, the provision of the collective bargaining agreement in the instant case are even less threatening to the purpose of § 302(a) than are no-docking clauses. The motivation for bribery is arguably greater where the employee representative is at the workplace some of the time, hence more aware of and involved in the conditions of employment.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-1156

TRAILWAYS LINES, INC.,
Appellee

v.

TRAILWAYS, INC. JOINT COUNCIL OF THE AMALGAMATED TRANSIT UNION, AFL-CIO, CLC,
Appellant

On Appeal from the District Court
of the Eastern District of Pennsylvania
D.C. Civ. No. 84-4703

Argued October 21, 1985

(Opinion Filed March 6, 1986)

SUR PETITION FOR REHEARING

PRESENT: ALDISERT, *Chief Judge*, SEITZ, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON and MANSMANN, *Circuit Judges* and VAN DUSEN, *Senior Circuit Judge.*

The petition for rehearing filed by appellant, Trailways, Inc., Joint Council of the Amalgamated Transit

Union, AFL-CIO-CLC, in the above-entitled case having been submited to the judges who participated in the decision of this court, and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judges Gibbons, and Weis would grant the petition for rehearing. Judge Becker would also grant the petition for rehearing for the reasons set forth in his panel dissenting opinion.

By the Court,

/s/ _____
Circuit Judge

DATED: April 14, 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

C.A. No. 84-4703

TRAILWAYS LINES, INC.

vs.

TRAILWAYS,INC., JOINT COUNCIL OF THE AMALGAMATED TRANSIT UNION, AFL-CIO

MEMORANDUM OPINION AND ORDER

WEINER, J. February 13, 1985

The plaintiff filed this action seeking a declaratory judgment that § 302(a) of the Labor Management Relations Act, 29 U.S.C. § 186(a), makes illegal, and, therefore, unenforceable, a provision of its labor contract with the defendant covering payments by the plaintiff of its share of pension contributions for the benefit of employees who have taken leaves of absence to accept full-time positions with the defendant Union.[1] Defendant filed a counterclaim seeking a declaration that the aforesaid provision is enforceable, that plaintiff be enjoined from further violating the contract, and that plaintiff pay all pension contributions due and owing to the Trailways-Amalgamated Transit Union Master Retirement Trust,

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[1] Section 120(i) of the collective bargaining agreement provides:

"Employees accepting positions with the Union or parent Union, shall be eligible for Group Insurance and Pension Plan as provided other employees, and the Company shall make their required contribution on such employees' behalf."

plus interest. Presently before the court is the motion of the plaintiff for summary judgment, and the motion of the defendant to dismiss and for summary judgment. For the reasons which follow, we grant the motion of the plaintiff and deny the motion of the defendant.

Defendant raises the threshold question of the propriety of this court's jurisdiction, arguing that primary jurisdiction for raising plaintiff's claim lies wth the National Labor Relations Board. The defendant alleges that the complaint essentially raises an issue of illegal preference toward union officials. We disagree. Plaintiff's complaint raises a specific ground allegedly rendering Section 120(i) of its contract with the defendant illegal: the proscription on certain financial transactions, between itself as an employer and the representatives of its employees, as set forth in section 302(a).[2] § 302(e) expressly confers upon the district courts of the United States jurisdiction to restrain violations of that section. 29 U.S.C. § 186(e), *Sellers v. O'Connell*, 701 F.2d 575, 577 (6th Cir. 1983). While plaintiff does state an alternate ground raising an issue of illegal preference, our decision does not require us to reach it.

In deciding upon the enforceability of the contract provision, i.e., whether Trailways is required to make the disputed pension contributions or, in the alternative, whether it is prohibited from doing so, we must address the preliminary question of whether those employees who take leaves of absence from their employer's service to take up full-time positions administering the union which

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[2] § 302(a), 29 U.S.C. § 186(a), reads in pertinent part:

> "It shall be unlawful for any employer . . . to pay, lend, or deliver, . . . any money or other thing of value—(1) to any representative of any of his employees who are employed in any industry affecting commerce; or (2) to any labor organization, or any officer or employee thereof, which represents . . . any employees of such employer who are employed in an industry affecting commerce, ...

negotiates with that employer, are still to be considered, for the purposes of the statute, the employees of such employer. This question is all important because although § 302(a) proscribes financial dealings between employers and the representatives of their employees, § 302(c)(5) removes the proscription of § 302(a) with respect to money or other things of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the *employees of such employer*, if the payments are intended to be for the purpose of providing pensions. § 302(c)(5)(c), 29 U.S.C. § 186(c)(5)(c) (emphasis added). Since it is undisputed by the parties that the Trailways-Amalgamated Transit Union Master Retirement Trust Fund meets the qualifications under § 302 of the "trust fund established for the purpose of providing pensions," the question of whether these union officials retain their status as Trailways' employees while on their leaves, will be dispositive.

Defendant directs our attention to *New York State Teamsters Conference Pension and Retirement Fund v. Hoh*, 554 F.Supp. 519 (N.D. N.Y. 1982), a case in which the positions of the parties were the opposite of that here (i.e., the Teamsters Fund argued that its officials were not the employees of the companies granting leaves of absence). In *Hoh* the court stated:

> . . . plaintiff's (Teamster's Union) contention that . . . defendants were not "employees" of a brewery since they were full time union officials, and therefore not entitled to pension credits or benefits, is wholly without merit. First, elected union officials were considered brewery employees on a leave of absence. . . . see *Moglia v. Geoghegan*, . . . , 403 F.2d 116 (2nd. Cir. 1969); . . . second, as *Blassie* (v. Kroger Co., 345 F.2d 58, (8th Cir. 1965)) points out, it is not unlawful under § 302 for the Trust to pay benefits to employees of the trust and union offi-

> cials, especially when there is a writing setting forth the basis for such payments. . . .

554 F.Supp. 519, 528 n. 15. We think defendant's reliance on *Hoh* is overstated. First, the *Moglia* case cited in *Hoh* does not concern employees on leaves of absence, but concerns retired persons. Second, the *Blassie* case deals with pension benefit payments from a trust, and not employer contributions to a trust.

Furthermore, we believe the *Blassie* case is contrary to defendant's position. The opinion, written by then Circuit Judge Blackmun, states that § 302(c)(5) requires that there be payment, by the employer, to the trust, "during an employee's active employment", 345 F.2d 58, 68. An employee is defined as one who "ordinarily is presently engaged in employment. He is one employed by another, one who works for wages or salary in the service of an employer." *Id.* at 68-69. The union officials involved in the case *sub judice* are not the active employees of the plaintiff. They draw no salary from the plaintiff, nor can their current duties in service to the union be considered as also in the service of the plaintiff.

The *Hoh* case itself does not decide the exact issue *sub judice*. In *Hoh* the Teamster's Fund sought a declaration that former elected union employees were not entitled to the pension credits paid on their behalf nor the benefits to be derived therefrom. The basis of the claim was that the union itself was actually making the contributions, funneling the money through the respective brewery defendants to be deposited in the Trust. The court upheld this system specifically because the breweries invloved, although held not to be the actual employers of these union officials, acted only as conduits. Since it was the union, and not the brewery defendants, who had given "something of value" to the union officials and the union was also held to be the employer of these officials, the fact that the brewery defendants acted as

conduits for the pension contribution payments was held not violative of § 302. 554 F.Supp. 519, 528. *Hoh*, therefore, is at least inapposite to the instant case where the union's contention is that contributions by Trailways, out of Trailways' own funds, and not merely as a conduit for the union's funds, is not impermissible under § 302(a).

More on point, we believe, is *Reinforcing Iron Workers v. Bechtel Power Corp.*, 463 F.Supp. 643 (E.D. Mich. 1978), *aff'd*, 634 F.2d 258 (6th Cir. 1981), where it was held that an employer's contributions on behalf of union stewards, as was mandated by a collective bargaining agreement, constitutes a violation of § 302 and that, therefore, the contract provision was unenforceable. The holding was premised upon the factual finding that the duties of the stewards was "more correctly characterized as either that of an agent of a labor organization or as a representative of an employer's employees, either of which violates the terms of (29 U.S.C.) § 186."

The instant case involves pension contributions for the chairman and secretary of the national Amalgamated Transit Union Joint Council and the presidents of three union locals. As was stated by the United States Supreme Court in *United States v. Ryan*, 350 U.S. 299 (1956), "in using the term 'representative', Congress intended that it include any person authorized by the employees to act for them in dealings with their employers. . . . (A) narrow reading of the term 'representative' would substantially defeat the congressional purpose." *Id.* at 303-304. We can comprehend no other result but that the union officials in the case *sub judice* are employees of the defendant union and representatives of the employees of the plaintiff.

In conclusion, the individuals, on whose behalf the disputed pension contributions are sought, qualify as the representatives of the employees of the plaintiff and are not themselves the employees of the plaintiff. If the pro-

vision contained in the collective bargaining agreement between the plaintiff and the defendant is enforced, the plaintiff would be engaging in an illegal financial transaction under § 302(a) of the Labor Management Relations Act of 1947. We find that § 121(i) of the collective bargaining agreement is unenforceable. Accordingly we grant the plaintiff's motion for summary judgment, and deny the defendant's motion for summary judgment.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

C.A. No. 84-4703

TRAILWAYS LINES, INC.

vs.

TRAILWAYS, INC., JOINT COUNCIL OF THE AMALGAMATED TRANSIT UNION, AFL-CIO

February 13, 1985

ORDER

The motion of the defendant to dismiss and for summary judgment is DENIED.

The motion of the plaintiff for summary judgment is GRANTED.

The Court declares that neither Trailways Lines, Inc. nor any of its divisions or subsidiary corporations is required or allowed by law to make monetary contributions to the Trailways-ATU Master Retirement Trust, or any other retirement trust, on behalf of employees who hold or accept full-time positions with the Trailways, Inc. Joint Council, Local Unions 1112, 1133, 1531, 1534, 1544 of the Amalgamated Transit Union, AFL-CIO, CLC, or said Amalgamated Transit Union.

The Joint Council, Locals Unions and the Amalgamated Transit Union, AFL-CIO, CLC, are hereby stayed from taking any action to require Trailways Lines, Inc., or its divisions or subsidiary corporations to make such contributions.

IT IS SO ORDERED.

/s/ Charles R. Weiner
CHARLES R. WEINER

SUPREME COURT OF THE UNITED STATES

No. A-977

TRAILWAYS, INC. JOINT COUNCIL OF THE AMALGAMATED TRANSIT UNION, AFL-CIO-CLC,
Applicant,

v.

TRAILWAYS LINES, INC.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 11, 1986.

/s/ William J. Brennan, Jr.
Associate Justice of the Supreme Court of the United States

Dated this 17th
day of June, 1986.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-1156

TRAILWAYS LINES, INC.,
Appellee

v.

TRAILWAYS, INC. JOINT COUNCIL OF THE AMALGAMATED TRANSIT UNION, AFL-CIO, CLC,
Appellant

On Appeal from the District Court of the Eastern District of Pennsylvania
D.C. Civ. No. 84-4703

Present: GARTH, BECKER and VAN DUSEN, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel October 21, 1985.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered February 14, 1985, be, and the same is hereby affirmed. Costs taxed against the appellant.

ATTEST:

/s/ Sally Mrvos
Clerk

March 6, 1986

Certified as a true copy and issued in lieu of a formal mandate on April 22, 1986.

Test:

/s/ M. Elizabeth Ferguson
Chief Deputy Clerk
U.S. Court of Appeals
for the Third Circuit

FILED
OCT 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-400

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

October Term, 1986

TRAILWAYS, INC., JOINT COUNCIL OF THE AMALGAMATED TRANSIT UNION, AFL-CIO, CLC,
Petitioner,

v.

TRAILWAYS LINES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a provision in a collective bargaining agreement requiring the Company to make pension contributions on behalf of former employees who have taken indefinite leaves of absence to work full-time for the Union violate Section 302 of the Labor Management Relations Act, 29 U.S.C. §186?

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 86-400

TRAILWAYS, INC., JOINT COUNCIL OF THE AMALGAMATED TRANSIT UNION, AFL-CIO, CLC,
Petitioner,

v.

TRAILWAYS LINES, INC.,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Trailways Lines, Inc. ("Trailways") submits this Brief in Opposition to the Petition for a Writ of Certiorari filed by Trailways, Inc., Joint Council of the Amalgamated Transit Union, AFL-CIO, CLC ("Union") with this Court on September 11, 1986.

STATEMENT OF THE CASE

The collective bargaining agreement between Trailways and the Union purports to require Trailways to make pension contributions on behalf of former employees who have taken indefinite leaves of absence from Trailways to work full-time for the Union. Section 120 of the agreement states, in pertinent part:

> SECTION 120. Leaves of Absence — (a) Any employee, upon application in writing, may be granted a leave of absence, without pay.

* * *

> (i) Employees accepting positions with the Union or parent Union, shall be eligible for Group Insurance and Pension Plan, as provided other employees, and the Company shall make their required contribution on such employees' behalf.

On October 2, 1984, Trailways filed this action seeking injunctive relief and a declaratory judgment that Section 120(i) of the agreement was unlawful under Section 302 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 186, and Sections 8(a) (1) and (3) and 8(b)(1)(A) and (2) of the LMRA, 29 U.S.C. § 158(a)(1) and (3) and § 158(b)(1)(A) and (2).

The District Court granted Trailways' motion for summary judgment, holding that Section 120(i) violated Section 302. (App. 23a-29a.) The United States Court of Appeals for the Third Circuit affirmed. (App. 1a-20a.) Neither Court addressed the Section 8 claims.

It is uncontested that Section 120(i) calls for payments of a type declared to be illegal by Section 302(a), which provides:

> It shall be unlawful for any employer . . . to pay, lend, or deliver or agree to pay, lend, or deliver any money or other thing of value —
>
> (1) to any representative of any of his employees who are employed in an industry affecting commerce; or
>
> (2) to any labor organization or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce. . . .

Pension contributions made on behalf of full-time Union officials are plainly "things of value" paid to an "officer or

employee" of the Union representing Trailways employees. (App. at 4a.)

The Union contends in its Petition for Certiorari that these pension contributions fall within the scope of Section 302(c)(1), which sets forth one of the exceptions to Section 302(a).

The Union did not raise this contention in the District Court. There, it relied exclusively on a different exception, Section 302(c)(5), 29 U.S.C. § 186(c)(5). On appeal, however, the Union raised its Section 302(c)(1) argument and the Court of Appeals addressed both alleged exceptions in its Opinion, holding neither exception applicable to the pension contributions required by the collective bargaining provision at issue. (App. at 5a, n.2.)

Section 302(c)(1) states:

> The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or *to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer;* . . . . (Emphasis added.)

Because pension contributions on behalf of a full-time Union employee on an indefinite leave of absence from Trailways are not payments made "as compensation for, or by reason of, [the Union official's] service as an employee of [Trailways]," they do not fall within the Section 302(c)(1) exception. In his opinion for the Court of Appeals for the Third Circuit, Judge Garth stated:

> Clearly, the statute contemplates payments to former employees for *past* services actually rendered

> by those former employees *while they were employees of the company*. Just as clearly, however, the pension fund benefits paid on behalf of former employees serving as Union officials while on leave from Trailways are not compensation for their past service to Trailways. (App. 9a.) (Emphasis in original.)

The Union's petitions to the Third Circuit for rehearing and rehearing *en banc* were denied (App. 21a-22a). Now it seeks yet another opportunity to plead its cause.

ARGUMENT

This case meets none of the standards that would justify a grant of certiorari. While the Union's Petition suggests that the issue presented is of great importance to the entire American labor movement, the Union's argument relies upon its amalgamation of the unique contract provision at issue in this case with uncontroversial contract provisions establishing quite different obligations. In fact, the decision of the Third Circuit is quite narrow and casts no doubt on any established labor relations practice.

The Union's second argument — that the decision of the Third Circuit in this case is in "analytical conflict" with the Second Circuit's opinion in *BASF Wyandotte Corp. v. Local 227, International Chemical Workers Union, AFL-CIO*, 791 F.2d 1046 (2d Cir. 1986) ("*BASF Wyandotte*") — also depends upon the failure to recognize a crucial distinction. Once the distinction is drawn between payments to active Company employees who are granted released time to perform services for the Union and payments to full-time Union employees who do no work for the Company at all, there remains no conflict, analytical or otherwise, between the Second Circuit and Third Circuit decisions.

The Union also attempts to draw support from allegedly analogous decisions made under other statutory

provisions. But, as Trailways has contended from the outset, Section 120(i) of the collective bargaining agreement not only violates Section 302, as the Third Circuit correctly held, it also violates Sections 8(a)(1) and (3) and 8(b)(1)(A) and (2) of the LMRA as well.

Thus, the Union seeks review of a narrow question on which there is no contrary authority and concerning which there is every reason to believe that the courts below reached the correct conclusion.

I. The Court of Appeals Decision Has No Far Reaching Consequences.

In its Petition, the Union presents a litany of major collective bargaining agreements that allegedly contain provisions "similar" to the one at issue in this case. The similarity the Union perceives is that all such provisions obligate employers to pay their employees for time that those employees spend on union business. Trailways contests neither the existence nor the long and venerable history of such provisions. The Second Circuit's opinion in *BASF Wyandotte, supra*, 791 F.2d at 1050-53, contains an excellent discussion of the practices the Union refers to and of Congress's manifestations of approval of them.[1]

However, those practices have nothing whatsoever to do with the narrow issue decided by the Court of Appeals for the Third Circuit in the present case. The provision at issue here, Section 120(i), requires payments not to employees of Trailways, but to full-time employees of the Union who are on indefinite leaves of absence from their previous work for the Company. These are not Trailways employees on released time from their work

1. Section 8(a)(2) of the LMRA, as amended in 1947, specifically provides that "an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay." 29 U.S.C. §158(a)(2).

for the Company. They are Union employees who happen to have once worked for Trailways. To group together a provision requiring pension payments on behalf of full-time Union officials who do no work for the Company with provisions requiring payments to Company employees who do some work for the Union simply begs the question. Are the provisions relevantly similar or aren't they? The Third Circuit properly held that they aren't.

The Union is careful not to assert that any other provision of any major collective bargaining agreement is identical to the one at issue or has the same effect. In fact, no such provision has been cited at any step of the proceedings in this case. The Third Circuit decision will cause no one to doubt the legality of "no-docking" provisions such as those addressed in *BASF Wyandotte*. *See infra*, pp. 6-9. Nor will anyone doubt, because of the Third Circuit opinion, the legality of any other provisions that provide for payments to Company employees who spend part of their time engaged in Union activities. The Third Circuit in the present case held only that provisions calling for pension contributions by an employer on behalf of full-time Union employees clearly violate Section 302.

II. There Is No Conflict Between the Circuits on the Question Presented.

The Union's assertion that the Third Circuit opinion in this case and the Second Circuit opinion in *BASF Wyandotte* are in "analytical conflict" is a transparent attempt to conceal the fact that their results are not in conflict at all. The Second Circuit held that a "no-docking" provision fell within the Section 302(c)(1) exception and was, therefore, legal. The agreement guaranteed four hours per day of released time during which BASF employees, the Union president and secretary, could engage in Union business. As we noted in

Section I, *supra*, such a provision is very different from the provision at issue in this case. The Court of Appeals for the Third Circuit recognized this fact in its discussion of the District Court opinion that was affirmed by the Second Circuit, *BASF Wyandotte Corp. v. Local* 227, *International Chemical Workers Union*, 591 F.Supp. 339 (N.D.N.Y. 1984). Judge Garth said:

> There is a sound distinction between payments made to a union official who goes on *temporary* leave to conduct union business and then returns to *active* employment, and payments on behalf of union officials who are on *full-time* leave but who may *never* return to full-time employment of his employer. (App. 11a.) (Emphasis in original).

This "sound distinction" harmonizes the conclusions of the Second and Third Circuits.

The "analytical conflict" suggested by the Union derives from Judge Kearse's interpretation of the language of Section 302(c)(1), which exempts payments of an employer to an employee made "as compensation for, or by reason of, his service as an employee of such employer." 29 U.S.C. §186(c)(1). Focusing on the phrase, "by reason of," Judge Kearse noted that the point of this alternative language was to permit certain "fringe benefits," such as vacations or leave for jury duty, which are not "compensation for . . . service" but payments made "by reason of" services rendered. Of course, pension *benefits*, as opposed to pension *contributions*, are perhaps the paradigm of such lawful payments. These are payments "occasioned by the fact that the employee has performed or will perform work for the employer." *BASF Wyandotte*, *supra*, 791 F.2d at 1049.

The Union argues that this language would compel a different result in the instant case. Because the pension contributions on behalf of Union officials on indefinite leave from the Company arguably might be viewed as payments "occasioned by the fact that the employee has performed or will perform work for the employer," the Union urges that they fall within the exception of Section 302(c)(1).[2]

However, it is by no means clear that even the Second Circuit would view its analysis as compelling this result. The Second Circuit was evaluating payments made to Union officials who were indisputably current, active employees of the Company. Indeed, BASF sought in its unsuccessful suit to distinguish between payments for the time Union officials spent in meetings with management and payments for the time the Union officials spent on other Union-related business, arguing that the latter, but not the former, violate Section 302. The Court's inability to see a "meaningful distinction between time spent in meetings with management and time spent in preparing for those meetings" led it to conclude that the Section 302(c)(1) exception applied to the payments there at issue.

The Court, however, explicitly ignored "for purposes of this case the reference in Section 302(c)(1) to former employees, since no-docking provisions have relevance only to persons who are currently serving as employees." *BSAF Wyandotte, supra*, 791 F.2d at 1049 n.1. Since the

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2. The Third Circuit properly found that the exception in Section 302(c)(1) concerning payments to "former" employees as "compensation for, or by reason of," their service as employees did not apply to pension contributions measured by the salaries being paid by the Union to full-time Union officials for contemporaneous services to the Union. The Court also held that the exception for payments to "present" employees did not apply because the Union officials perform no present compensable services for Trailways. (App. 9a, n.5)

Union officials subject to Section 120(i) are not "currently serving as employees" of Trailways, the Second Circuit opinion itself makes clear that its analysis is not intended to apply. What is encompassed within the concept of payments made "by reason of" an employee's *former* employment remains open. It is plainly intended to include pension *benefits*, but nothing in the *BASF Wyandotte* opinion remotely suggests that it includes pension *contributions*, which are "payments in lieu of wages." *Knauss v. Gorman*, 583 F.2d 82, 89 (3d Cir. 1978). The Second Circuit, presented with Section 120(i), would certainly see a "meaningful distinction" between payments for released time to current employees and payments of pension contributions on behalf of former employees who are now full-time Union officials. The Second Circuit probably would — and certainly should — agree with the Third Circuit that the latter payments are not "by reason of [the Union officials'] service as [Trailways] employee[s]" and are therefore unlawful. Thus, even the "analytical conflict" identified by the Union is chimerical.

III. There is No "Tension" Between The Decision in This Case and Cases Involving A Refusal to Bargain in Violation of Section 8(a)(5) of the LMRA.

The Union seeks to bolster its untenable Section 302 argument by citation to cases decided under Section 8 of the LMRA which, according to the Union, are "in tension with" the decision of the Third Circuit in the present case. Apparently, this is somewhat less even than an "analytical conflict." The cases in question are *Midstate Telephone Corp. v. NLRB*, 706 F.2d 401 (2d Cir. 1983), and *Axelson, Inc. v. NLRB*, 599 F.2d 91 (5th Cir. 1979). These decisions of the Second and Fifth Circuits enforced orders of the National Labor Relations Board

("NLRB") requiring that employers bargain about paying the wages and expenses of employees engaged in collective bargaining negotiations for the union.

The Union contends in its Petition that, because reimbursement of employee negotiators is a mandatory subject for bargaining, it cannot be illegal to make such payments. This conclusion seems uncontroversial. However, payments to present company employees who spend a part of their time representing the union in negotiations with the company are not comparable, as we have been compelled to repeat several times in this Brief, to the payment of pension contributions for full-time union officials who do *not* work for the company. Thus, this "line" of cases is clearly beside the point.

Even further afield is the Union's reliance on a case decided under the Federal Service Labor-Management Relations Statute ("FSLMR"), 5 U.S.C. §§ 7101-7135. In *American Federation of Government Employees, AFL-CIO, Council of Locals No. 214 v. Federal Labor Relations Authority*, No. 85-1500 (D.C. Cir. August 26, 1986) ("*AFGE*"), the Court held that the Air Force Logistics Command had to bargain about a proposal made by the Union to allow 12 Union representatives 100% "official time." The Union apparently views the holding in *AFGE* — that the FSLMR compels bargaining even about a proposal for 100% "official time" — as some indication that it is not illegal under the LMRA for a private employer to make pension contributions for full-time Union employees.

Contrary to the impression given by the Union's Petition, however, the District of Columbia Circuit was applying in *AFGE* a *statutory provision* specifically mandating negotiations concerning an Agency's compensation of its employees for time spent on union business, *i.e.*, "official time." The FSLMR requires that

> any employee representing an exclusive representative . . . shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.

5 U.S.C. § 7131(d). There is, of course, no parallel provision in the LMRA.

Furthermore, the "official time" proposal explicitly sanctioned by the FSLMR differs considerably from the provision at issue here. Section 7131 provides that "official time" *must* be granted for negotiation of a collective bargaining agreement and associated activities, but *may not* be granted for activities relating to the internal business of the Union. 5 U.S.C. § 7131 (a) and (b). This restriction constrains Agency employees, even those on 100% official time, to a temporary release from their service as employees for a limited purpose. By contrast, the activities of the full-time, permanent Union employees in the instant case are completely independent of any employment relationship to Trailways and are controlled exclusively by the Union. Thus, the Union's argument founders both on the law and on the facts.

Petitioner's reliance on cases involving an alleged "refusal to bargain" is misplaced, as is demonstrated by the decision of the NLRB in *Mead Packaging*, 273 NLRB 1451 (1985). In that case, the employer unilaterally discontinued the granting of insurance coverage and/or pension benefit multipliers to employees on extended leaves of absence to serve as officers of the Union. These benefits were not available to employees on leave for any other reason. The Board held that this action by the employer did not violate the employer's duty to bargain under Sections 8(a)(1) and 8(a) (5) of the LMRA. The Board further stated:

> [I]f the issue were before us, we would find that the Respondents' provision of additional benefits to union officers under their collective-bargaining

> agreements with the Union violated Section 8(a)(3) and 8(b)(2) of the Act. Since the Respondents merely declined to continue to provide a benefit to the union officers which, as discussed above, had an unlawful disparate impact on employees, we find that they did not violate Section 8 (a)(5) and (1) by doing so without bargaining with the Union.

Id. at 1452.

There is no question that Section 120(i) grants preferential treatment to Union officials in violation of Sections 8(a)(3) and 8(b)(2). Of all those who take leaves of absence from Trailways, only those who assume full-time Union positions would have Trailways make pension contributions on their behalf by virtue of Section 120(i).

Under scrutiny, the Union's arguments do not support its Petition. The question presented is narrow and the Third Circuit decided it correctly. Moreover, the Union's subtle attempts to describe the decision below as in "tension" with other decisions would not rise, even if successful, to the level of a conflict between the Circuits. Having failed to demonstrate any "tension" whatsoever, the Union has given this Court no reason to review the Third Circuit's decision.

CONCLUSION

For the foregoing reasons, the Union's petition for a writ of certiorari should be denied.

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Dated: October 10, 1986